U.S.
APR 29 1963
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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 1045

ALBERT A. GOLDFARB,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on February 5, 1964.

OPINION BELOW

The order of civil contempt entered by the District Court for the Eastern District of Michigan, Southern Division on May 9, 1963, is printed in Appendix A, *infra*, pages 14 and 15. The opinion of the Circuit Court of Appeals is reported at 328 Fed. 280.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 5, 1964, and a copy of the judgment is printed in the Appendix B at pages 16, 17, 18 and 19. The jurisdiction of the court is invoked under 28 U.S.C. 1254 (1), providing for the granting of a writ of certiorari upon the petition of any party after rendition of judgment by the Court of Appeals.

QUESTIONS PRESENTED

The petitioner refused to answer certain questions before a Grand Jury impaneled to investigate possible income tax violations on the part of a certain individual, or individuals. (5a certified record). Petitioner's refusal was based on his belief that the questions as posed would necessarily call for the divulging of confidential information, protected by the attorney-client privilege. (Ibid 5a) Further, petitioner stipulated that the information sought might be used to the detriment of his client. (Ibid 13a) Nevertheless, the District Court refused to recognize the applicability of the Fifth Amendment to the United States Constitution. (Ibid 13a) Further, the Court rejected the claim of attorney-client privilege and the Honorable Fred

Kaess entered an order holding petitioner in civil contempt (Appendix A, pages 14 and 15). The Court of Appeals affirmed. The questions presented are:

1. Was petitioner's refusal to answer questions that would necessarily elicit information born of an attorney-client relationship justified by the policy and purpose of the attorney-client privilege?

2. Did petitioner have standing to invoke the privilege of the Fifth Amendment to the United States Constitution on behalf of his client, who was absent from the Grand Jury proceeding?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which is relevant to decision of this case, the text of which is set forth in Appendix D hereto, is Amendment V of the United States Constitution.

STATEMENT OF FACTS

(Number in parentheses refer to page numbers in the Petitioner's Appendix in the certified record)

On May 8, 1963, the Petitioner, Albert A. Gollarb, was served with a subpoena from the United States Attorney's office compelling him to appear before a Grand Jury that was considering an indictment against one or more individuals for possible violation of Federal statutes concerning income tax evasion (5a). In response to the subpoena, the Petitioner appeared before the Grand Jury on May 8, and at that time refused to answer questions relating to his client, Walter Pilat, who was at that time not present before the Grand Jury. The questions involved confidential communications between Petitioner and his client.

On the same day, the Petitioner was taken before the Honorable Fred W. Kaess, District Judge for the United States District Court for the Eastern District of Michigan, Southern Division for a ruling as to whether or not the testimony which would be elicited by the questions propounded to the Petitioner was privileged (2a). The questions sought to determine whether or not there was a real estate transaction between the Petitioner's client, Walter Pilat, and Charles Sherman with respect to the acquisition of the house located at 11310 Meyers Road, Detroit, Michigan. The United States Attorney asked the Petitioner if there was a conversation with one Lawrence Burns, also an attorney, concerning the acquisition of this property. The Petitioner refused to answer this question on the basis that the answer would divulge confidential information protected by the attorney-client privilege. The Petitioner further refused to answer on the basis that the information sought could be detrimental to his client (13a). The court ruled that the petitioner was required to answer the question (13a). The matter was adjourned for resumption at the Grand Jury Hearing (16a).

Other questions not concerning confidential communications with his client were freely answered by Petitioner. In this respect he answered that there were no discussions with any mortgage companies or banks, that he was not in possession of and did not receive any evidence of title from his client, and that he did not dispense any money or any other consideration to Charles Sherman (28a, 29a, 30a). The balance of the questions which the United States Attorney propounded to the Petitioner indicated that the answer to the question as to whether or not there was a conversation with Lawrence Burns would necessarily require divulging the entire conversation between the Petitioner and his client (19a, 20a, 24a).

The Petitioner took the position that since the answer to this question would necessitate divulging confidential communications, he would be privileged not to answer (26a, 27a). The court ruled when the matter was again brought before it that the Petitioner was required to answer the question relating to the alleged conversation with Lawrence Burns regarding the Petitioner's client. Upon refusal to do so, the court held the Petitioner in contempt of court and stayed the effectiveness of the order of contempt for thirty (30) days to permit the Petitioner to file an Appeal with the United States Court of Appeals for the Sixth Circuit, and on February 5, 1964 the Court of Appeals affirmed the decision of the District Court. The court order of contempt requires the Petitioner be committed to the custody of the United States Marshal until his contempt has been purged. The effectiveness of the order was further stayed by Mr. Justice Stewart of this Honorable Court on April 10, 1964 pending the outcome of this appeal.

REASONS FOR GRANTING WRIT

The Circuit Court opinion intimated that an extension of the attorney-client privilege was being sought by petitioner and, further, that such extension would do violence to the purpose and history of the rule. In respectful and certain dissent, petitioner urges that the exchange of relevant information among attorneys with a common interest is a necessary concomitant to a meaningful attorney-client privilege. Moreover, an extension of the plain purpose of the privilege is not sought by petitioner, nor is the allegation of extension supported by the record. Instead, the record testifies to an indirect eliciting of information that is concededly privileged:

> Mr. Goldfarb: Now we come to the crux of the situation. The question: "Have you had occasion to perform services for one Walter Pilat, also known

as Peewee Pilat, with respect to the purchase or acquisition of a home located at 11310 Myers Road, Detroit?" This is when I informed the Grand Jury that I believe the privilege existed between client and attorney.

The Court: As the question is put, I agree with you.

Mr. Goldfarb: The next question is: "Did you have occasion to discuss the matter of the purchase of the house with one Lawrence Burns during 1961, at any time? When?" (Lawrence Burns represented Sherman in the alleged real estate transaction.)

The Court: All right. Now what is privileged about that?

Mr. Goldfarb: If your Honor please, I again imposed—or stated my privilege, because that is a question that if answered might certainly answer other questions, which are privileged. (Grand Jury Transcript, Pages 19-20)

It would be ingenious to suggest that the second question would not in substance answer the question which the court readily characterized as privileged. The necessary implication of an affirmative answer to the second question is that petitioner did have occasion to perform services respecting the purchase or acquisition of certain real estate.

The startling result of characterizing the first answer as privileged and the second answer as non-privileged is to make the existence or non-existence of the privilege turn on the wording of the question, thus placing an unwarranted premium on subtle questioning techniques. Petitioner urges that if any premium is to be placed, it should be placed on the policy and protection sought to be achieved by the attorney-client privilege.

In order to promote freedom of consultation of legal advisers by clients, the apprehension of com-

pelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent.

8 *Wigmore on Evidence*, McNaughton Revision Sec. 2291, page 545 (1961).

The removal of apprehension cannot be accomplished if the value of the privilege is inversely proportional to the skill of the interrogator. If the technique employed by the government attorney in the instant case is condoned, the protection afforded by the privilege is unjustifiably circumvented.

Even conceding, arguendo, a request for an extension of the attorney-client privilege, protecting the exchange of relevant information among parties with a common interest in the absence of declarant's voluntary waiver would neither unduly hamper the search for truth nor cause inequity to the client. (See note, *Waiver of Attorney-Client Privilege on Inter-Attorney Exchange of Information*, 63 *Yale Law Journal* 1038.) Moreover petitioner finds strong support for his conviction that the exchange of relevant information between attorneys does not constitute a waiver of the attorney-client privilege.

In a United States Circuit Court for the 9th Circuit as reported in *32 Law Week*, 2515 decided on March 27, 1964, *in re Continental Oil Co. v. United States*, the Court held that a grand jury could not compel attorneys to produce memoranda relating to their interviews with clients even though the attorneys exchanged such information, since such exchange did not constitute a waiver of the attorney-client privilege.

If, indeed, petitioner's refusal to answer the second question is tantamount to a request for an extension of the attorney-client privilege, petitioner urges that the extension

is a necessary bulwark against the use of a sophisticated questioning process which would relegate the attorney-client privilege to the abyss of legal sophistry."

Petitioner also urges that the government's breaching of an attorney-client relationship without a showing of necessity is a more severe denial of present law and policy than the alleged extension sought by petitioner. It certainly cannot be argued that the impaneling of a grand jury constitutes *per se* justification for directly or indirectly breaching an attorney-client relationship. The implications of such a ruling are as apparent as they are unwarranted. The United States Supreme Court decisively rejected similar argument in the rationale of *Hickman v. Taylor*, 329 U.S. 495, 91 L. Ed. 451, 67 S. Ct. 385 (1947).

> Petitioner has made more than an ordinary request for relevant non-privileged facts in the possession of his adversaries or their counsel. He has sought discovery as of right of oral and written statements of witnesses whose identity is well known and whose availability appears unimpaired * * * We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the file and mind of the attorney Fortenbaugh without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice. (Pages 508-9)

The record in the instant case reveals significant omission of an indication or claim that refusal by petitioner to provide information born of an attorney-client relationship would "unduly prejudice the preparation of (the government's) case or cause him any hardship or injustice." The Honorable Judge Kaess of the District Court articulated the complete failure of the government in this respect by stating:

> I am wondering what further information or * * * further value it would be to either the Government or the Grand Jury if those questions were answered. (Grand Jury Transcript, Page 52)

There can be no contention that the questions posed to petitioner were directed at eliciting information born of an attorney-client relationship. The Hickman case dictates a conclusion that failure, by the government, to show the necessity of acquiring the information, bars an excursion into the mental impressions of the petitioner. The government's failure—or silent refusal—to evidence value, especially in light of the Judge's question, emphasizes the absence of the necessity for compelling petitioner to testify under penalty of contempt.

2. The most serious question raised on appeal and again in petition for rehearing before the United States Circuit Court of Appeals was the question of an attorney's standing to invoke the Fifth Amendment to the United States Constitution on behalf of an absent client. Both the Grand Jury Transcript ("with respect to persons under investigation," page 3) and the Appellee's brief before the Circuit Court (Appendix E) sustain petitioner's apprehension that the information was being sought by the Government for the purpose of bringing charges against more individuals than was ostensibly indicated in the record.

> The fact that an individual retains a lawyer should not give rise to the creation of a sanctuary within which the individual may operate through the agency of his attorney while the courts and the law enforcement agencies are to be hamstrung in *efforts to call the client to account.* (Emphasis added. Appendix E, page 22.)

Far from seeking the creation of a sanctuary, petitioner seeks a denial of a doctrine that would allow an inquisitorial

body to compel an attorney to divulge information obtained from the attorney-client relationship which might form a link in the chain of circumstances to be used to establish grounds for criminal prosecution of his client. Petitioner urges that rather than aiding an adversary of his client, it is petitioner's sworn obligation to raise all the just defenses available to his client. The Circuit Court ruling, however, sustains a theory that although a client may refuse to testify on the basis of possible self-incrimination, his attorney is barred from raising the defense on his client's behalf.

The United States Supreme Court has not dealt with the precise problem presented by the instant case, and the Federal Circuit Court are in conflict on this issue. (For the opposing views by the Circuit Courts in this area see: *Constitutional Law—Privilege Against Self-Incrimination —Attorney Entitled to Invoke Absent Defendant's Privilege*. Note *10 Wayne Law Review* 436. Although many cases have spoken of the privilege against self-incrimination as being personal, these previous applications of the personal nature of the privilege, involved cases with completely different facts, or were cases which required no discussion of the personal nature of the privilege. (Ibid page 438). Walter Pilat had not waived his privilege against self-incrimination, nor does this case represent an attempt of petitioner to invoke the privilege on behalf of an artificial entity, such as a corporation or association. (See *Hale v. Henkel*, 201 U.S. 43, 49-50 L. Ed. 652, 26 S. Ct. 370 (1906). The instant case does represent an attempt by petitioner to defeat an indirect encroachment on his client's most fundamental constitutional guarantee in a criminal proceeding: the right to be free from self-incrimination.

Walter Pilat's individual right to plead the Fifth Amendment is amply supported by case law, and the invocation of the privilege is not an indication of guilty knowledge.

> Moreover, where a question calls for a direct acknowledgment of a fact which might form a link in a chain of circumstances to be used to establish guilt, the witness will not be required to answer, even though his answer would not, in fact, expose him to any peril. * * * In other instances an affirmative answer to a question might not be an admission of criminal guilt, but only of one fact among several, that must be established to make out a crime. * * *
> *Maffie v. U.S.*, 209 F. 2d 225, 227 (1st Cir. 1954)

That the task of gathering evidence for a criminal prosecution belongs to the state and not to the individual facing possible indictment is too fundamental to belabor. Petitioner urges that this court sustain the necessary concomitant of that fundamental principle, by ruling that an attorney cannot be compelled to give evidence born of an attorney-client relationship, to the possible detriment of his client. *Application of House*, 144 F. Supp. 95 (N.D. Cal. 1956), supports the proposition that an attorney has standing to invoke the Fifth Amendment on behalf of his client with this current reasoning:

> Thus on the question of the lack of standing of an attorney to raise the claim of privilege for his client although the client does not himself utter the words effectuating the claim, or is not himself physically present, the government cites no convincing authority. The government apparently seeks to establish a novel rule that unless the client himself participates in hearings such as the one held before the agent of the Internal Revenue Bureau, he waives his Constitutional rights. * * *
> Page 100.

In rejecting the argument that an attorney lacks standing to invoke the Fifth Amendment on behalf of an absent

client, the *House* case noted the pervasiveness of income tax laws and the serious consequences of subtly infringing on an individuals' Constitutional rights in this area:

> The field of taxation represents probably the greatest single area of contact between individuals and the force of the state. A slight invasion of the right against self-incrimination in this field has as great and baleful consequences upon the relations between the individual and the state as does an invasion of that right in the more dramatic areas of public life. (Ibid Page 103)

Another case, strongly analogous to the case at bar, *Judson v. U.S.*, 229 F. 2d 460 (9th Cir. 1963) fully sustains petitioner's contention that an attorney should have standing to invoke the privilege of the Fifth Amendment on behalf of his absent client. In that case, the defendant's privilege against self-incrimination was invoked on his behalf by his attorney. The information sought by the Grand Jury in the *Judson* case was, again, the product of an attorney-client relationship, and the court rightfully decried the attempt of the government to do indirectly what could not be done directly.

> The government states that the evil which the Fifth Amendment sought to prevent is not present when the prosecutor seeks evidence of A's guilt from B. But this argument ignores the realities of the relationship existing where B is A's attorney. An attorney is his client's advocate. His function is to raise all the just and meritorious defenses his client has. No other "third party" or agent nor representative stands in such a unique relationship between the accused and the judicial process as does his attorney. He is the only person besides the client himself who is permitted to prepare and conduct the defense of the matter under investigation. The attorney and his client are so identical with respect

to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry. (Page 467).

In denying Petitioner standing to invoke the Fifth Amendment on behalf of his absent client, the instant case proposes to deny Petitioner the right to protect his client from possible injury. Even more startling, the contempt ruling sustains the anomalous and indefensible doctrine that an attorney can properly be used as a witness against his clients. The intricacies and pervasiveness of the tax laws deem it necessary that an attorney protect his client from future indictment or prosecution. When the possibility of prosecution is evident, the need for protection is all important, and the absence of a client from judicial proceedings should not give license for forcing incriminating information from his attorney. The eliciting of information through indirect means is an unjustified erosion of the protection guaranteed by the United States Constitution. This erosion is what Petitioner seeks to prevent by invoking the Fifth Amendment on behalf of his client, Walter Pilat. This Court should take the opportunity to establish Petitioner's right to do so.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 28, 1962.

APPENDIX A

ORDER OF CIVIL CONTEMPT

UNITED STATES DISTRICT COURT
Eastern District of Michigan, Southern Division

In Re:
Grand Jury Proceedings

At a session of said Court, held in the Federal Building in Detroit, Michigan, on this 9th day of May, 1963.

Present: The Honorable Fred W. Kaess, United States District Judge.

This matter concerns the refusal of a witness, one Albert Goldfarb, to answer questions before the Grand Jury duly empaneled and sitting in this district on the ground that, as an attorney-client privilege has existed between the witness and one Walter Pilat, the answers would constitute a violation of the privilege regarding confidential communication between attorney and client. After a preliminary ruling by this Court that certain of the questions were not subject to the objection of privilege, and the continued refusal of the witness to answer the questions in the secrecy of the Grand Jury room, the Grand Jury was convened in open Court. At that time the transcript of the secret interrogation was read and the Court directed the witness to answer certain questions as will appear more fully from a review of the transcript of the proceedings which is hereby made a part of the record. The witness was then adjudged to be in civil contempt but the effectiveness of the order

was stayed for 30 days to allow the witness to take an appeal to the Court of Appeals for the Sixth Circuit.

It is therefore, ordered, adjudged and decreed that Albert Goldfarb is in civil contempt of Court for failure to answer questions put to him and is to be committed to the custody of the United States Marshal for this district until such time as his contempt has been purged. It is the further order of this Court that the effectiveness of this adjudication of civil contempt be and the same is hereby suspended for a period of 30 days, that is, until June 10, 1963, pending further proceedings in the Court of Appeals.

Fred W. Kaess,
United States District Judge

APPENDIX B

OPINION AND JUDGMENT

No. 15460

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division

United States of America,
Plaintiff-Appellee,
v.
Albert A. Goldfarb,
Defendant-Appellant.

Decided February 5, 1964.

Before Miller, Cecil and Phillips, Circuit Judges.

Phillips, Circuit Judge. Defendant-appellant, an attorney, refused to answer certain questions before a grand jury on the grounds that they involved confidential communications between him and his client and come within the attorney-client privileged communications rule. Thereupon he was taken before the Honorable Fred W. Kaess, District Judge for the United States District Court for the Eastern District of Michigan, Southern Division, for a ruling as to

whether or not the testimony which would be elicited by the questions so propounded was privileged.

The District Judge ruled that certain of the questions were not within the privileged communications rule. When appellant persisted in his refusal to answer the questions the District Judge entered an order adjudging appellant to be in civil contempt of court for failure to answer the questions put to him and committing him to the custody of the United States Marshal until such time as his contempt has been purged. This order was suspended pending proceedings on appeal.

The background facts may be summarized as follows:

The United States was seeking an indictment against one Charles Sherman, and sought information concerning an alleged real estate transaction between Sherman and Walter Pilat. Appellant was attorney for Pilat and Lawrence Burns was attorney for Sherman.

The four questions which appellant refused to answer were as follows:

1. Did you have occasion to discuss the matter of the purchase of the house with one Lawrence Burns during 1961?

2. To your knowledge did Mr. Lawrence Burns represent as attorney of otherwise Mr. Charles Sherman with respect to the sale or disposition of the house at 11310 Myers Road, in connection with any conversation that you may have had or dealings you may have had with Mr. Lawrence Burns, on behalf of Mr. Walter Pilat?

3. Did you have occasion to have a conversation with one Lawrence Burns during 1961, or at any other time in which the subject of the house at 11310 Myers Road was discussed?

4. Have you at any time had discussions with, or negotiations with Mr. Charles Sherman, or his wife, or attorneys, or agents on their behalf in connection with the sale or disposal of the house located at 11310 Myers Road by them?

It is a general rule that confidential communications between an attorney and his client, made because of the professional relationship and concerning the subject matter of the attorney's employment, are privileged from disclosure, even for the purposes of the administration of justice. *Chirac v. Reinicker*, 11 Wheat. 280, 6 L. Ed. 474. The essentials of the general rule are stated in 8 Wigmore, Evidence §2292, at 554 (McNaughton rev. 1961) as follows:

"(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived."

It is clear that none of the four questions propounded to appellant call for the disclosure of any information communicated to him by his client, Walter Pilat. Appellant has not been called upon to divulge communications made to him in confidence by his client. It is urged by appellant, however, that the attorney-client privilege should be extended in this case to cover more than communications between the client and his attorney. Appellant contends, in effect, that this cloak of protection should be draped around all occurrences and conversations which have any bearing, direct or indirect, upon the relationship of the attorney with his client.

The extension of the rule urged by appellant would do violence to the purpose and history of the privilege. The rule is designed to enable a client to confide in his attorney, secure in the assurance that there will be no disclosure. The privilege does not envelope everything arising from the existence of an attorney-client relationship. Communications made to an attorney in the course of his professional employment by persons other than the client or his agent are not privileged. The rule extends only to communications made by or on behalf of the client. *Rendalph v. Quidnick Co.*, 23 Fed. 278 (C. C. D. R. I.); *Crosby, Admr. v. Berger*, 11 Paige, 377, 42 Am. Dec. 117.

It is to be remembered that the attorney-client privilege is an exception carved from the rule requiring full disclosure, and as an exception, should not be extended to accomplish more than its purpose. As Dean Wigmore said in his oft-quoted statement: "It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." 8 Wigmore, Evidence (2291, at 554 (McNaughton rev., 1961). The judicial decisions have echoed this need for a restrictive interpretation and application of the privilege. *Prichard v. United States*, 181 F. 2d 326 (C.A. 6); *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass.).

Here the questions did not call for disclosure by the appellant of anything said to him by his client. Since the attorney-client privilege extends only to communications between the client and his attorney, we hold that these four questions did not call for answers within the purview of the privilege.

The judgment of the District Court is affirmed.

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

No. 15,460

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

United States of America, Plaintiff-Appellee, v. Albert Goldfarb, Defendant-Appellant.	

Before Miller, Cecil, and Phillips, Circuit Judges.

Appellant has filed a petition for rehearing in the above-styled case. Briefly, the facts were that appellant, an attorney, refused to answer certain questions before a grand jury on the ground that an attorney-client privilege existed. This Court held that the particular questions in issue did not call for answers within the scope of the attorney-client privilege. ... F.2d ...

Appellant now contends that the Fifth Amendment privilege against self-incrimination is applicable. This point was mentioned only incidentally in appellant's brief on appeal.

Upon consideration, we are of the opinion that this argument is without merit. The protection against self-incrimination has long been characterized as a personal privilege, and does not permit one to plead the fact that some third person might be incriminated by his testimony. *Hale v. Henkel*, 201 U.S. 43; *United States v. White*, 322 U.S. 694; *Brasacher v. United States*, 346 F.2d 450 (C.A. 8); *In re Fabiani*, 390 F.2d 383 (C.A. 6).

The petition for rehearing is hereby denied.

/s/ Harry Phillips,
Circuit Judge

APPENDIX D

UNITED STATES CONSTITUTION AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

EXCERPT OF APPELLEE'S BRIEF BEFORE THE CIRCUIT COURT

II. Application to Case at Bar.

The difficulty with appellant's view of the attorney-client privilege we submit, is that it seeks to expand the grudgingly granted privilege against disclosure of a confidential communication into a sweeping case of an incompetent witness. Such incompetency does undoubtedly exist, for example, in the still-vibrant spousal incompentency which forbids the other spouse being called by the prosecution in cases where the one spouse is a defendant, and incompetency which is quite distinct from the privilege against disclosure of a confidential communication made within the marital relationship, cf. *Hawkins v. United States*, 358 U.S. 74 (1958). Such an incompetency has never existed with regard to attorneys.

The fact that an individual retains a lawyer certainly should not give rise to the creation of a sanctuary within which the individual may operate through the agency of his attorney while the courts and the law enforcement agencies are to be hamstrung in efforts to call the client to account. In its classic simplicity, the attorney-client privilege has been thought to be a vital adjunct to the right to counsel undeniably conferred upon every federal criminal defendant by the constitution. It would obviously be a mockery to confer a right to counsel upon a defendant, and yet require the consulted attorney to be a witness regarding the statements made to him by his client.

APPENDIX F

ORDER OF THE UNITED STATES SUPREME COURT STAYING ISSUANCE OF MANDATE

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1963

Albert A. Goldfarb, Petitioner,

vs.

United States

Upon consideration of the application of the petitioner, and the Solicitor General having no objection thereto,

It is ordered that the issuance of the mandate of the United States Court of Appeals for the Sixth Circuit be, and the same is hereby, stayed until May 1, 1964, providing a petition for writ of certiorari is filed in this Court on or before that date in the above-entitled case. Should a petition for writ of certiorari be filed on or before that date, this stay is to continue pending the action of the Court upon the petition. Should the petition be denied, this stay is to terminate automatically. In the event the petition is granted, this stay is to continue in effect until the issuance of the mandate of this Court.

s/ Potter Stewart,
Associate Justice of the Supreme
Court of the United States.

Dated this 10th day of April, 1964.

LIBRARY

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1045

ALBERT A. GOLDFARB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On May 9, 1963, petitioner, an attorney, was found in civil contempt by Judge Kaess in the United States District Court for the Eastern District of Michigan (R. 33a-34a)[1] for refusing—on the ground of the attorney-client privilege—to answer certain

[1] The designation "R." refers to the Appellant's Appendix filed in the court below, and the designation "Tr.", to the typewritten transcript of proceedings before the grand jury, both of which have been certified to this Court.

questions put to him before a grand jury. Petitioner was committed to the custody of the United States Marshal until he answered the questions, but the effect of the order was stayed pending disposition of petitioner's appeal. (Pet. App. 15, 23.) Since the grand jury was empanelled in March 1963, its term will expire in September 1964. Federal Rules of Criminal Procedure, Rule 6(g). The contempt order will, therefore, become moot unless enforced prior to that time.

The grand jury was investigating possible income tax evasion charges against Charles Sherman, who was reported to have sold some real estate to Walter Pilat. (R. 2a-3a, 5a-6a.) One Lawrence Burns had been attorney for Sherman. Petitioner, who represented Pilat, invoked the attorney-client privilege in refusing to answer the following questions (R. 3a, 19a, 20a-21a, 23a, 27a):

> Did you have occasion to discuss the matter of the purchase of the house with one Lawrence Burns during 1961?
>
> To your knowledge did Mr. Lawrence Burns represent as attorney or otherwise Mr. Charles Sherman with respect to the sale or disposition of the house at 11310 Myers Road, in connection with any conversation that you may have had or dealings you may have had with Mr. Lawrence Burns, on behalf of Mr. Walter Pilat?
>
> Did you have occasion to have a conversation with one Lawrence Burns during 1961, or at any other time in which the subject of the house at 11310 Myers Road was discussed?

> Have you at any time had discussions with, or negotiations with, Mr. Charles Sherman, or his wife, or attorneys, or agents on their behalf in connection with the sale or disposal of the house located at 11310 Myers Road by them?

The contention (Pet. 5-9) that petitioner was entitled to refuse to answer these questions on the ground of the attorney-client privilege is plainly frivolous. The rule is that "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." *Prichard* v. *United States*, 181 F. 2d 326, 328-329 (C.A. 6th), affirmed, 339 U.S. 974; VIII Wigmore, *Evidence* (3d ed.), Sec. 2292. The questions at issue here do not relate to any communication from Pilat to petitioner, let alone a confidential one. "There is no magic in a law license that would prevent a lawyer from being required to testify to acts of this kind, just as the same type of testimony might be required of a banker or of a real estate broker." *Pollock* v. *United States*, 202 F. 2d 281, 286 (C.A. 5th), certiorari denied, 345 U.S. 993; *McFee* v. *United States*, 206 F. 2d 872, 876 (C.A. 9th), certiorari denied, 347 U.S. 927; *United States* v. *DeVasto*, 52 F. 2d 26, 30 (C.A. 2d).

Equally without merit is the argument (Pet. 9-13) relating to Pilat's privilege against self-incrimination. The privilege was never invoked.[1]

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Solicitor General.

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Assistant Attorney General.

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Attorneys.

MAY, 1964.

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[1] The phrase apparently relied upon for the argument that the privilege against self-incrimination was invoked was that petitioner's answers might be used "to the detriment of his client" (Pet. 2; R. 13a), but, when read in context (Tr. 26-27), it is clear that petitioner was merely arguing that to answer certain questions might operate as a waiver of the attorney-client privilege by opening the door to other questions.

U. S. GOVERNMENT PRINTING OFFICE 1964